95-1689

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRISTON LEE BASS, JR., M.D., *Petitioner*,

-vs.-

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA, THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, MN.D., AND LEO A. WILNER, BOARD OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS, *Respondents*

On Petition for Writ of Certiorari To The Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

R. PAUL SORENSON
Counsel of Record
513 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-9797

24pp

QUESTIONS PRESENTED FOR REVIEW

1. What criteria must a State meet to satisfy the Due Process clause in providing "active supervision" to State-sanctioned disciplinary and licensing entities to protect licensed professionals from sham and surreptitious actions or the utilization of "peer" review" proceedings for the improper motives of other competing professionals rather than the benefit of the public.

2. Whether the Supremacy Clause of the United States Constitution requires a State to give full faith and credit to corrective action of the United States Air Force which determined that the wrongfully procured and factually false prior disciplinary action by the Department of the Air Force upon which State discipline was based was void ***ab initio***?

LIST OF PARTIES

There are no parties not named in the caption.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Authorities	v
Citations of the Official and Unofficial Reports of the Opinions & Orders Entered in the Case by Courts or Administrative Agencies	1
Concise Statement of the Basis for Jurisdiction in this Court	2
Constitutional Provisions, Statutes and Regulations Involved in this Case	2
Statement of Case	2
Facts material to Consideration of the Questions Presented	9

REASONS FOR GRANTING THIS WRIT 14

The State of Nevada Still Exercises No Active Supervision Over Professional Licensing Boards Dispensing Discipline to Protect Licensed Professionals from Sham and Surreptitious Proceedings Entered for Anti-Competitive Purposes 14

The Supremacy Clause of the United States Constitution requires the State of Nevada to give Full Faith and Credit to Corrective Action Which Determined that the Wrongfully Procured and Factually False Prior Disciplinary Action by the Department of the Air Force Upon which State discipline was based was Void *Ab Initio* 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES	Page
Patrick v. Burget, 486 U.S. 94 (1988)	14
FEDERAL STATUTES	
5 USC § 552a Privacy Act	6
STATE STATUTES	
Nevada Revised Statutes	
NRS 233B.135	3
NRS 233B.150	3
NRS CHAPTER 630	4
NRS 630.311	4
OTHER AUTHORTIES	
Nevada Administrative Code	
NAC § 630.460	4
NAC § 630.470	4
Air Force Regulation 168-13	8

CITATIONS OF THE OFFICIAL & UNOFFICIAL REPORTS OF THE OPINIONS & ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Amended Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of Nevada entered in Case No. 9455, *In the Matter of the Complaint Against Harriston Lee Bass, Jr., M.D.*, filed August 6, 1991 (Appendix pp. 15a-24a)

Findings of Fact, Conclusions of Law of the Eighth Judicial District Court of the State of Nevada, County of Clark, entered in Case No. 297956, *Bass v. Board of Medical Examiners* filed May 6, 1994 (Appendix pp. 7a-12a)

Judgment of the Eighth Judicial District Court of the State of Nevada, County of Clark, Remanding Matter for Hearing in Las Vegas entered in Case No. 297956, *Bass v. Board of Medical Examiners* filed May 6, 1994 (Appendix pp. 13a-14a)

Order Granting Petition for Writ Prohibition entered by the Supreme Court of the State of Nevada in Case 25604, *Board of Medical Examiners, et al. v. Eighth Judicial District Court & Bass* filed August 25, 1995 (Appendix pp. 1a-6a0

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Supreme Court of Nevada was entered on August 25, 1995. The order denying the petition for rehearing was filed on January 18, 1996. The statute which confers jurisdiction on this court to review the judgment in question is 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V - Rights of Persons

> No person. . .shall be deprived of life, liberty or property, without due process of law. . .

United States Constitution, Amendment XIV, Section 1, Rights of Citizens

> ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nevada Revised Statutes 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.

"3. . . . .The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

Nevada Revised Statutes 233B.150. Appeal from final judgment of district court.

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the supreme court. The appeal shall be taken as in other civil cases.

Nevada Revised Statutes Chapter 630 Government Licensing and Discipline of Physicians and Assistants

Nevada Revised Statutes 630.047. Applicability.

"1. This chapter does not apply to:

(a) A medical officer of the armed services or a medical officer of any division or department of the United States in the discharge of his official duties for which a license is not required."

Nevada Revised Statutes 630.304. Grounds for initiating disciplinary action.

"The following acts, among others, constitute grounds for initiating disciplinary action:

"1. Obtaining, maintaining or renewing or attempting to obtain, maintain or renew a license to practice medicine by bribery, fraud or misrepresentation or by any false, misleading, inaccurate or incomplete statement."

Nevada Revised Statutes 630.311. Review of complaint; investigation; members of committee; determination by board.

"1. The board or a committee of its members designated by the board shall review a complaint and conduct an investigation to determine whether there is a reasonable basis for the complaint."

Nevada Administrative Code Chapter 630. Applicable Provisions Re: Physicians and Assistants. Disciplinary Action.

§ 630.460 Hearings; Appearance; pleadings; motions; documents.

"5. All motions, unless made during a hearing must be in writing. All written motions must set forth the nature of relief sought, the grounds therefor, and the points and authorities relied upon in support of the motion. A party desiring to oppose a motion may serve and file a written response to the motion within 20 days after service of the motion. The moving party may serve and file a written reply within 10 days after service of the opposition to the motion. A decision on the motion will be rendered without oral argument unless oral argument is requested by the board, in which event the board will set a date and time for hearing."

§630.470 Hearings: Procedure.

"4. Prehearing depositions of witnesses and parties may not be taken.:

5 USC § 552a Privacy Act.

"(a)(7) The term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) **Conditions of disclosure.**--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

. . . .

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section:. . . ."

Department of Defense Directive
July 29, 1982
Number 6000.7

SUBJECT: Dissemination of Information on Medical Officers

A. PURPOSE

Under reference (a), this Directive establishes policy, provides guidance and assigns responsibilities regarding dissemination of information concerning

limitations imposed on DoD medical officers by official action.

. . . .

D. POLICY

It is the policy of the Department of Defense that when a medical officer is in any way unfit to execute his or her responsibilities in the practice of medicine or osteopathy that the medical officer's commander or supervisor will initiate immediately appropriate action, under the credentials review process of the Military Department concerned, to suspend, limit, or withdraw the medical officer's clinical practice privileges. This is not only a regulatory requirement, but a moral and ethical responsibility of the officials involved.

. . . .

F. RESPONSIBILITIES

2. The Secretaries of the Military Departments, or their designees,shall:

. . . .

(c) Ensure that all information transmitted in accordance with section G., below, has been developed in proceedings that accorded due process to the medical officer whose performance or competence is at issue.

G. **INFORMATION REQUIREMENTS**

1. The method of reporting information will be through the Federation of State Medical Boards, using the format attached as enclosure 1."

AIR FORCE REGULATION 168-13

"8-12. **Impartiality of Reviewing Personnel.** Members of the medical staff are not disqualified, per se, from taking part in a practitioner's credentials review, strictly because they are personally acquainted with the practitioner or because they have knowledge of those matters giving rise to the action. Credentials review is, in substance, a peer review function. However, personnel participating in the review should be able to make a fair and impartial review of the case.

. . .

(c) Guidelines contained in this paragraph are intended as general guidance only, and are not mandatory requirements. They are not intended to confer substantive rights upon a practitioner, and no credentials review action should be reaccomplished on the grounds that such action lacked impartial review, unless a showing of the same is made on a factual basis.

STATEMENT OF CASE

Facts Material to Consideration of the Questions Presented

The federal questions sought to be reviewed were first raised by Petitioner in his Answer to the Amended Complaint before the Board of Medical Examiners filed on April 5, 1988 (Appendix 57a-58a). The same federal questions were presented to the District Court in the Petition for Judicial Review. The District Court agreed with Dr. Bass that there was a denial of due process and reversed the Board of Medical Examiners on the issue of venue (Appendix 7a-14a). The Supreme Court of the State of Nevada was apprised of the venue issues as well as all the other Due Process arguments in the Petitioner's Answer to Petition for Writ of Prohibition filed on June 14, 1994.

The following is a time line of the material facts:

6/30/86
Dr. Bass' performance as a surgeon/soldier reviewed in an Officer's Effectiveness Report. Dr. Bass was evaluated as well above standard in the report and Commander recommended then Captain Bass for immediate promotion to Major and further recommended him for appointment of Chief of Surgery Services at Nellis Air Force Base Hospital. Appendix 29a-36a.

8/4/86
Dr. Bass is ordered to a psychiatrist at Nellis Hospital that was not of his choosing. He respectfully declined the order and sought an independent evaluation by his own psychiatrist. Based upon his refusal to obey this order, Dr. Bass was summarily suspended. (This type of military order has been subsequently prohibited by Congress. Pub. L. 102-484, Div. A, Title V, § 545(a)-(h), October 23, 1992, 106 Stat. 2416)

8/26/86
An *ad hoc* Credentials Committee meeting was held to discuss the credentials of Dr. Bass. Neither Dr. Bass nor his then counsel were aware of this *ad hoc* meeting. The consensus of the members at the *ad hoc* meeting was to recommend the termination of the privileges of Captain Bass. (Appendix 37a-38a.) Dr. Bass' promotion and appointment recommended on 6/30/86 is put on hold.

9/18/86
A Credentials Committee hearing was convened over the violation of the military order by Dr. Bass on August 4, 1986. All the members of the *ad hoc* committee who held their secret meeting on August 26th were present. No members of the Credentials Committee advised Dr. Bass or his attorney that they had already reached their determination but proceeded to feign a fair hearing and recommendation was as set

forth in their *ad hoc* committee meeting of August 26th. (Appendix 40a.)

11/17/86
Report was made limiting Dr. Bass' privileges based upon the recommendation of the Credentials Committee. (Appendix 41a-43a)

12/18/86
Dr. Bass discusses the decision with Colonel Pees and receives explanation that this was a non-medical matter which was protected from disclosure by the Privacy Act. (Appendix 44a-45a.)

5/28/87
Dr. Bass is discharged from the United States Air Force.

6/8/87
Dr. Bass files his application to renew his medical license in Nevada without disclosing anything about the report of 11/18/86.

6/30/87
USAF reports the 11/18/86 action to the Federation of State Medical Boards as a limitation or restriction on Bass's medical privileges. (Appendix 46a-48a)

12/14/87
State Board of Medical Examiners files a public complaint alleging Bass was untruthfull on his 6/8/87 application when he didn't disclose the 11/17/86 report (ROA 1-9). Bass was not given an opportunity to explain the application before the complaint

(ROA 120-121) was filed. Bass was denied discovery or any kind concerning any investigation the BME may have done. Subpoenas were quashed concerning any testimony about the investigation on the basis of confidentiality(ROA 99-104).

1/12/88
Bass files motion to dismiss based upon a violation of the Privacy Act 5 USC 552A 9ROA 13-18).

4/5/88
Bass's Answer to Amended Complaint alleges that his answers on his application for renewal of his medical license are correct, that the USAF filed their report in error and that the action of the BME is in violation of the 14th Amendment to the U.S. Constitution and the Privacy Act. (Appendix 55a-59a)

10/12/88
USAF voids the report of 11/17/86 and reinstates Dr. Bass's credentials *ab initio.* (Appendix 27a - 28a)

12/2/88
BME invites Dr. Bass to a hearing on his motion to dismiss. The board acknowledges that they have not read the motion. They refuse to accept copies of the same for their consideration, cut-off counsel for Bass after a few sentences into his presentation and then walked out of the hearing. The motions

were denied. (Transcript of Hearing, 12/2/88, pp. 1-27)

8/6/91
BME enters a order that Dr. Bass violated NRS 630.304 when he failed to advise them of the 11/17/86 report and issued a public reprimand. (Appendix 15a-24a) Dr. Bass appeals to District Court

5/6/94
District Court enters Findings of Fact and Conclusions of Law, and Judgment Remanding Matter for Hearing in Las Vegas. (Appendix 7a-14a) BME petitions Supreme Court of Nevada for Writ of Prohibition.

8/25/95
Nevada Supreme Court grants Petition for Writ of Prohibition. (Appendix 1a-4a)

10/2/95
Dr. Bass files Petition for Rehearing before the Nevada Supreme Court (Appendix 73a-85a.)

1/18/96
Petition for Rehearing denied (Appendix 25a-26a)

REASONS FOR GRANTING THIS WRIT

The State of Nevada Still Exercises No Active Supervision Over Professional Licensing Boards Dispensing Discipline to Protect Licensed Professionals from Sham and Surreptitious Proceedings Entered for Anti-Competitive Purposes

In Patrick v. Burgett, 486 U.S. 94 (1988) this Court required that the individual states must exercise "active supervision" over State Medical Boards to protect individual practitioners from anti-competitive actions by such Boards. Dr. Bass is such a professional who has been victimized by the lack of active supervision. He was a young, black Captain and General Surgeon at Nellis Air Force Base. He received the highest evaluation ratings. Significantly, he pioneered the use of endoscopic surgical procedures at Nellis Air Force Base Hospital, eliminating a significant source of referrals to civilian surgeons in the Las Vegas Valley. Dr. Bass was targeted by some of his colleagues virtually simultaneously when it was determined by the Air Force that he was to be promoted to Major and appointed to supervise them. Although there was no medical basis for adverse action against Dr. Bass, after he was arrested and incarcerated for approximately 12 hours in a matter subsequently dismissed with the record sealed, a disciplinary proceeding was initiated against him in the United States Air Force for failing to obey an order to see a psychiatrist selected by his accusers within the next 15 minutes.

The Nellis Air Force Base Credentials Committee met prior to the hearing with its Legal Advisor to conduct a "dry run" at which time they determined that they would recommend to the Commanding Officers that Dr. Bass' privileges be terminated. This "dry run" or rehearsal was conducted without the knowledge or participation of Dr. Bass or his counsel although the Committee maintained a record of the rehearsal which was later discovered. Appendix 37a-38a. These sham proceedings of the Nellis Air Force Base Credentials Committee were reversed ***ab initio*** subsequently by the United States Air Force as being wrongfully procured and without basis. Appendix 27a-28a.

Meanwhile, Dr. Bass left the United States Air Force. He was informed on December 18, 1986 by Colonel Pees that the wrongfully procured disciplinary action against him was subject to the Privacy Act, 5 USC 552A and need not be reported and further that it would be unlawful to report it to other licensing entities. In reliance on such representation by Colonel Pees documented by his letter (Appendix 44a-45a) Dr. Bass did not report to the State of Nevada that his medical license or privileges had been suspended or restricted.

Upon the State of Nevada Board of Medical Examiners being apprised of the alleged violations by the United States Air Force they initiated formal proceedings against Dr. Bass without conducting any investigation or convening a peer review board as appears to be

required by their procedure. The Board of Medical Examiners has announced to the public and to the professionals that they dispose of 98% of their complaints against physicians during investigation and peer review proceedings which are non-public proceedings. There are no written rules and regulations published concerning that most important phase of the disciplinary proceeding. The Board of Medical Examiners then failed to provide Due Process required by the Fifth and Fourteenth Amendments to the United States Constitution in the formal proceedings initiated against Dr. Bass.

The Board of Medical Examiners refused to accept, read, consider or discuss copies of the Motion they were to hear and in fact walked out of the Motion to Dismiss hearing summarily denying said motion. They also sua sponte moved the venue of the hearing from Las Vegas to Reno after stipulating to move venue to Las Vegas. They determined that the United States Air Force action in dismissing the improperly procured disciplinary action ***ab initio*** was irrelevant and not entitled to full faith and credit under the Supremacy Clause. Appendix 71a.

Subsequently, the Eighth Judicial District Court reversed and remanded the Board's decision addressing in its decision only the issue of venue and declining to address the other substantive due process issues. Appendix 7a and 13a.

The Nevada Supreme Court ignoring those substantive issues other than venue reversed the action of the District Court. Appendix 1a.

To date, this professional has had no hearing on his substantive due process issues and there has been no active supervision by any entity of the State of Nevada over a renegade Board which has utilized its machinery for the improper and anti-competitive purpose of destroying a physician who pioneered the use of endoscopy procedures at the Nellis Hospital eliminating the referral source of local competing surgeons.

The Supremacy Clause of the United States Constitution requires the State of Nevada to give Full Faith and Credit to Corrective Action Which Determined that the Wrongfully Procured and Factually False Prior Disciplinary Action by the Department of the Air Force Upon which State discipline was based was Void *Ab Initio*

The sole basis of the decision of the Board of Medical Examiners was the void order of the United States Air Force. When the Hearing Officer addressed a question to the Board about the effect of the Air Force voiding their order ***ab initio***, they responded as follows:

> ". . .such order has no effect on these proceedings. . ."
>
> (Appendix 72a)

The Board of Medical Examiners then proceeded to rely upon the voided order for the sole basis of their decision against Dr. Bass. The Supremacy Clause of the United States Constitution requires the State of Nevada, its Administrative Agencies and Courts to give full faith and credit to the determinations of the United States Government.

CONCLUSION

The Court should grant this petition for writ of certiorari directing dismissal of the complaint filed against Dr. Bass by the Board of Medical Examiners.

Respectfully submitted,

R. Paul Sorenson
513 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-9797

Attorney for Petitioner